TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 867. 306 47

THE STATE OF MISSOURI EX RELATIONE THE LACLEDE GAS LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JULY 24, 1895.

(15,957.)

(15,957.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1895.

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1 *Transcript of the Record and Proceedings in the Supreme Court of the State of Missouri.*

In the Supreme — of Missouri, April Term, 1895. In Banc.

STATE OF MISSOURI *ex Rel.* THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, and THE CITY OF ST. LOUIS, Respondents.

2 THE UNITED STATES OF AMERICA:

To Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., not exceeding thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The State of Missouri *ex relatione* The Laclede Gas Light Company, relator, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Theodore Brace, chief justice of the supreme court of the State of Missouri, this second day of July, in the year of our Lord one thousand eight hundred and ninety-five.

THEO. BRACE,
Chief Justice.

[Endorsed:] State of Missouri *ex rel.* Laclede Gas Light Co. *vs.* Michael J. Murphy, street com'r, &c., *et al.* Citation. Filed July 2, 1895. Jno. R. Green, clerk.

UNITED STATES OF AMERICA, *Western District of Missouri*, } *ss:*

I hereby acknowledge due service of the within citation this 2d day of July, A. D. 1895.

W. C. MARSHALL,
Attorney for Defendants in Error,
M. J. Murphy and The City of St. Louis.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before

you, at the April term, 1895, thereof, between The State of Missouri, *ex relatione* The Laclede Gas Light Company, relator, plaintiff in error, and Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from the date of the citation in said cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said court *court* may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the United States Circuit Court for the Western District of Missouri, Central Division.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States,
Western District of Missouri, Central Division.

Allowed by—
THEO. BRACE,
Chief Justice.

[Endorsed:] No. —. United States circuit court, western district of Missouri, central division. State of Missouri *ex rel.* Laclede Gas Light Co. *vs.* Michael J. Murphy, street com'r, *et al.* Writ of error to the supreme court of the State of Missouri. Returned and filed 2nd day of July, 1895. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 12th day July, A. D. 1895.

Seal of the Supreme Court of Missouri.

JNO. R. GREEN, *Clerk.*

4 In the Supreme Court of the United States, October Term, 1895.

STATE OF MISSOURI *ex Rel.* LACLEDE GAS LIGHT COMPANY, Relator, Plaintiff in Error,
vs.
M. J. MURPHY, Street Commissioner of the City of St. Louis, and THE CITY OF ST. LOUIS, Respondents, Defendants in Error.

On the second Monday of October in this same term, before the justices of the Supreme Court of the United States, in the city of Washington, comes the relator, the said Laclede Gas Light Company, by its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said respondents and against the said relator, whereas by the law of the land the said judgment ought to have been given for the said relator and against the said M. J. Murphy and the City of St. Louis, and the writ of mandamus should have been awarded to relator as prayed for, and relator by its attorneys says—

That the supreme court of the State of Missouri erred in overruling relator's demurrer to respondents' return.

And the said court erred in overruling relator's motion to strike out portions of respondents' return.

And the said court erred in sustaining respondents' demurrer to relator's traverse and reply to respondents' return.

5 And said court erred in entering final judgment for respondents on the pleadings in this cause.

And said court erred in denying to relator the writ of mandamus prayed for in its petition in this behalf.

And the court erred in deciding that the ordinance of the city of St. Louis pleaded by respondents, and which is fully set out in relator's reply, is a valid ordinance and binding upon relator, and in deciding that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance.

And said court erred in deciding that said ordinance of the city of St. Louis was a lawful exercise of the police power and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinance in the conduct of its business, and that it was bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the city of St. Louis for illuminating purposes.

And said court erred in holding that the art of producing light by electricity was wholly unknown to science at the time the charter and franchise were granted to relator.

6 And the said Laclede Gas Light Company, relator, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, &c.

THE LACLEDE GAS LIGHT COMPANY,
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys of Record.

6½ [Endorsed:] Filed July 6, 1895. Jno. R. Green, cl'k.

7 STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 26th day of November, 1894, the following proceedings were had in the supreme court of the State of Missouri in a certain cause wherein The State of Missouri at the relation of The Laclede Gas Light Company was relator and Michael J. Murphy, street commissioner of the city of St. Louis, was respondent; which said proceedings were in words and figures as follows, viz:

STATE *ex Rel.* LACLEDE GAS L. CO., Rel.,
v.
M. J. MURPHY, Resp.

Comes now the said relator, by attorney, and files his petition for an alternative writ of mandamus herein; comes also the said parties, by attorneys, and file their suggestions in support and in opposition to said petition: and the said relator is granted three days in which to file further suggestions.

Which said petition is in words and figures as follows, to wit:

Petition for Mandamus.

In the Supreme Court of the State of Missouri, October Term, 1894.

In the Matter of the LACLEDE GAS LIGHT COMPANY.

To the honorable the judges of the supreme court of the State of Missouri:

The Laclede Gas Light Company, relator herein, gives the court to understand and be informed that it, the said relator,
8 is a body politic duly incorporated by an act of the General Assembly of the State of Missouri, approved March 2d, 1857, entitled "An act to incorporate the Laclede Gas Light Company;" that subsequently said act of March 2d, 1857, was amended by certain supplemental and amendatory acts, viz., "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, and "An act to amend an act to incorporate the Laclede Gas Light Company," ap-

proved March 26th, 1868; which said three acts of the General Assembly of the State of Missouri are in words and figures as follows:

An act to incorporate the Laclede Gas Light Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of the said corporation and the prosecution of its legitimate business.

SEC. 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

SEC. 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary; said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

SEC. 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis, for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

SEC. 5. The said company, its successors and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city, as established by the act entitled "An act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and

shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

SEC. 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

SEC. 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

SEC. 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20, of article first of the act entitled "An act concerning corporations," approved November 23, 1855.

SEC. 9. This act shall take effect from its passage, and shall continue in force thirty years.

Approved March 2, 1857.

An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

SEC. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before-recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An act to amend an act to incorporate the Laclede Gas Light Company, approved March 2d, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows:

12 SEC. 1. The said Laclede Gas Light Company shall, and may within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SEC. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

SEC. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory, is hereby repealed.

SEC. 4. An act entitled An act supplementary to and amendatory of an act entitled An act to incorporate the Laclede Gas Light Company, approved March 3, 1857, is hereby repealed.

SEC. 5. This act shall take effect from its passage.

Approved March 26th, 1868.

Said relator further shows to the court that said act of March 2d, 1857, as amended by said subsequent acts, constitutes the present charter of relator, which charter it has duly accepted, under which it has organized and carried on business, and which is in full force and effect; that by said charter relator is granted the privilege and right of lighting the city of St. Louis throughout its corporate

13 limits, and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor relator shall do the same with as much dispatch and as little inconvenience to the public as possible.

Any by said charter relator is vested with all other powers necessary to execute and carry out the privileges and powers expressly granted to it; but relator further states and shows to the court that on the 28th day of February, 1873, a certain agreement, known as the "tripartite agreement," was made and executed by and between the city of St. Louis, the St. Louis Gas Light Company, and the Laclede Gas Light Company, to wit, this relator, in and by which agreement, for certain valuable considerations therein set forth, this relator abandoned and surrendered any and all exclusive rights and all claims or pretences of claims of sole or exclusive privilege

or right of lighting any part of the city of St. Louis with gas or making or vending gas, gas-lights, or gas-fixtures, and also all exclusive right whatsoever under its said charter.

Relator further states that in pursuance of the terms of said charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of the public streets
14 and alleys of said city by electricity and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the city of St. Louis as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wire strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish light to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service relator has made arrangements to lay its wires underground along and under the streets of said city accord-
15 ing to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states that Michael J. Murphy is and was at or before the time hereinafter referred to street commissioner of the city of St. Louis, duly appointed, qualified, and acting as such under its charter, and as such are committed to him under said charter the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

Relator further states that, having completed its preparation to carry out the work above indicated and having given previous notice of its intention to do so to the said street commissioner of the city of St. Louis, it did, on the 30th day of October, 1894, proceed with a number of men required for that purpose to begin the work of excavating at a point on the east side of Broadway, being one of the public streets of said city, near the corner of Mound street, the

said point being adjacent to relator's generating plants, which work of excavating was proper and necessary for placing its wires under ground, whereupon a police force of the city of St. Louis, acting under the instruction and at the instigation and request of said Michael J. Murphy, respondent, who was therein acting as street commissioner of said city, stopped relator's men from proceeding with said work and caused relator's employés engaged in said work to be arrested, and said street commissioner, respondent herein, notified relator that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit, previously obtained from him for that purpose, as pro-

16 vided by ordinance; and relator states that by section 568, article I, chapter 15, of the Revised Ordinance, 1887, of said city of St. Louis, it is provided that "no person shall make or cause to be made any excavation on any public street, highway, or alley without written permission of the street commissioner so to do, excepting public work under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

That upon being so notified by said respondent, street commissioner as aforesaid, relator applied to said respondent as such street commissioner for a permit to make the necessary excavation on Broadway, so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its said charter rights and privileges, but said street commissioner arbitrarily, unlawfully, and contrary to his duty as such street commissioner in that behalf, refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, and also refused and still refuses to let relator make any such excavation without a permit, and threatens and still threatens to cause the arrest of any person who might thereafter enter upon or begin any such excavation for said purpose of laying any wire of relator's under ground, so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hindrance, viz., to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required in order to carry on the business for which relator's corporation was organized.

17 Relator states and shows to the court that it was and is the duty of said Michael J. Murphy, as such street commissioner of the city of St. Louis, to issue to it, said relator, a permit such as by it applied for as aforesaid, so that relator may without interference by the police or other authorities of said city exercise its charter powers and rights in that behalf above mentioned.

And relator states that by reason of the premises relator has been and is entirely without remedy in the premises unless it be afforded by the interposition of this honorable court by its writ of mandamus, and it therefore prays that a writ of mandamus may issue against said Michael J. Murphy, street commissioner of the city of St. Louis, commanding him to issue a permit to the relator to make an excavation along the east side of Broadway as near the curb as practi-

cable, and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive street and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible; and relator prays for such other process, orders, and remedies as may to the court seem meet and proper.

THE LACLEDE GAS LIGHT COMPANY,
By ISAAC H. LIONBERGER, *Vice-President.*

HENRY HITCHCOCK,
LIONBERGER & SHEPLEY AND
G. A. FINKELNBURG,
Attorneys for Relator.

18 STATE OF MISSOURI, } ss:
City of St. Louis, }

Isaac H. Lionberger, undersigned, being first duly sworn, on his oath states that the affiant is the vice-president of The Laclede Gas Light Company, the petitioner and relator in this behalf; that affiant has read the foregoing petition and knows the contents thereof, and that the several matters and things in said petition set forth are true to the best of his knowledge and belief.

ISAAC H. LIONBERGER.

Subscribed and sworn to before me this Nov. 23rd, 1894.

[SEAL.] GEORGE M. BLOCK,
Notary Public.

Term expires June 28, 1897.

Which suggestions in support of and in opposition to said writ are as follows, to wit:

In the Supreme Court of Missouri, October Term, 1894.

In the Matter of the LACLEDE GAS LIGHT COMPANY.

To the honorable the judges of the supreme court of the State of Missouri:

Representing the city of St. Louis and its street commissioner, M. J. Murphy, I have no objection to the issuance of an alternative writ of mandamus in this case, except subject to the qualifications hereinafter stated.

I.

19 I think the writ should run against The City of St. Louis in its corporate capacity and not against a mere officer thereof.

It may be questioned whether it would be proper for this court to issue a writ against a municipal officer, he not being such an officer as would be entitled to apply for it himself and the relator not being

possessed of the constitutional qualifications which entitle it to ask for a writ from this court.

The petition states no cause of action which gives this court jurisdiction as against a mere city officer, whereas such would be the case if the application was against the city, a political subdivision of the State.

It is eminently proper that the city should be the defendant in any litigation such as is involved in this application. The street commissioner may, possibly will, be changed before the determination of this litigation (Mr. Murphy's term of office expiring next April), so that when the final writ is issued it would run against one who would not probably be the proper officer to comply with the order; hence, if this application is changed so as to make the city the defendant, my objection to the issuance of the writ by this court for this reason will be overcome.

II.

In case such a change is made and the alternative writ is issued, I think the defendant ought to be allowed at least thirty days in which to make return to the writ.

My reasons for this suggestion are that the questions involved in this case are of the utmost importance and magnitude to the city of St. Louis.

20 The relator practically claims to have the right to fill the streets of St. Louis with one or more subways or conduits, as in its judgment may be necessary to transact the business it claims it has a right to transact under its charter, this, too, notwithstanding the space occupied by the streets is limited and the city is vitally interested in the space for the purposes of putting in sewer pipes, water pipes, and the manifold uses to which the subsurface of a street in modern times is subjected.

Granting the application of the relator would amount to a vast monopoly, for a monopoly of space in a street is as effectual in excluding competition as a monopoly of a patent would be in excluding other competitors.

III.

The proper determination of the issues that will arise in this case will necessitate the taking of volumes of testimony, both in Missouri, in the United States, and in foreign countries, particularly in Germany. Vital questions of fact will have to be settled, as well as questions of law. This is particularly true as to the proper meaning to be applied to that portion of sec. 5 of the act of 1857 which authorized relator to exercise the privilege of making and vending "any substance or material that may be now or hereafter used as a subtitute therefor" (meaning gas). A question of fact will thereby arise as to whether this grant of power meant that relator should have the right — construct conduits, subways, &c., for the purpose of supplying electricity for lighting purposes, when lighting by electricity was wholly unknown to art in 1857; also whether electricity

is a substance or material in any sense in which those words
21 were known or used by the law-makers in 1857 or at the present date.

A further inquiry of fact will arise in regard to whether or not the charter of relator expired in 1887—that is, thirty years after the date of the act of 1857—and also whether the act of 1868 is a valid act under the constitution of 1865; also whether relator organized and commenced the transaction of its business within one year from the time the act of 1857 went into effect, as required by par. 2, sec. 1, art. 8, of the constitution of 1865; also the question of whether sec. 2721, Rev. Stats. 1885 (being part of art. 5, chap. 42), which authorized the putting of wires underground, but provides that the same shall not be placed underground in any city unless the company "first obtain the consent of such city through the municipal authorities thereof," is not a legal restriction or alteration upon the powers granted the relator by the act of 1857 and the act of 1868 (if the act of 1868 is a valid act in view of the law as it existed in Missouri in 1855, which gave the legislature the right to alter or amend charters whenever it shall be deemed conducive to *be* public good so to do).

These suggestions are sufficient to impart to the court a slight conception of the importance of this litigation and of the necessity of giving the relator time enough to formulate in proper shape its defense, and also time enough to prepare for trial. The relator, of course, has had all the time it and its eminent counsel deemed necessary before beginning this litigation, and the city ought to have such time as will reasonably enable it to examine relator's contentions, its available defenses, and for the preparation of the case for trial.

Respectfully submitted.

W. C. MARSHALL,
Att'y for the City of St. Louis and M. J. Murphy.

22 In the Supreme Court of the State of Missouri.

In the Matter of the Petition of THE LACLEDE GAS LIGHT COMPANY for a Mandamus
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis.

Petitioner respectfully submits to this honorable court that the question involved in the accompanying petition for a mandamus is one of public interest and affects the inhabitants of the city of St. Louis generally; that it is of importance to the public as well as to petitioner to have the matter passed upon by the court of last resort in this State, and that an application to the local courts of St. Louis, followed by an appeal to this court, would cause a delay of about two years.

It was presumably for similar reasons that this court entertained a mandamus against petitioner in State *ex rel. vs.* Laclede Gas Light Co., 102 Mo., 472.

This court entertained an application for a mandamus in State *ex rel. vs.* Weeks, 93 Mo., 499, to compel the issuance of a dram-shop license.

In State *ex. rel. vs.* Newman, 91 Mo., 445, to compel the aldermen of Pierce City to direct the clerk to issue a certificate of election.

In State *ex rel. vs.* Williams, 96 Mo., 13, to permit an inspection of registration books.

In State *ex rel vs.* Williams, 99 Mo., 291, to compel the recorder of voters of the city of St. Louis to issue a certificate of election to relator as marshall of said city.

In State *ex rel. vs.* Board of Health, 103 Mo., 24, to compel the issuance of a certificate to practice medicine.

23 In State *ex rel. vs.* May, 106 Mo., 488, to compel the superintendent of streets of Kansas City to turn over certain office furniture and public records.

In State *ex rel. v.* Tracey, 94 Mo., 217, to compel the register of the city of St. Louis to extend a four-mile tax for school purposes upon the tax books.

Since writing the above I have read Mr. Marshall's suggestions to the court and desire to add the following:

The suggestion that the City of St. Louis should be made a party defendant in its corporate capacity in order to give this court undoubted jurisdiction seems to be based on the theory that the supreme court cannot issue a writ of mandamus except in matters falling within its appellate jurisdiction. This is erroneous. This court has decided otherwise in State *ex rel. vs.* Tracey, 94 Mo., 217. Besides, Mr. Marshall himself suggests that a constitutional question is involved in this case.

Nor ought petitioner to be prejudiced by the fact that the term of office of the defendant may possibly expire before this case is finally disposed of. If necessary, his successor may be substituted (see sect. 2300, Rev. St.), but even this would probably be unnecessary, for I apprehend that whatever this court will finally decide as to the relative rights of this city and the petitioner that decision will be followed by the city authorities without compulsory process on a particular officer who is technically the defendant.

The reason why the city was not formally made a party defendant to this proceeding was that it seemed improper to ask the writ to issue against the municipal corporation as a whole and

24 because it seemed more proper to counsel that the writ should be directed against the officer who is requested to perform the official duty sought to be enforced, and such is believed to be the usual practice in cases of this kind.

As to the questions of fact said to be involved in this case, strictly speaking, there are none. If defendant desires to aid the court in construing the language of petitioner's charter by taking testimony as to the meaning of certain words and this court is willing to receive such testimony, nevertheless the point to be decided remains a question of law for a court to pass on under pertinent rules of construction.

Petitioner claims no monopoly. It simply desires to lay its own

wires under ground. In doing so it not only seeks to exercise a charter right, but it is also responding to a general public demand on this subject.

Respectfully submitted by—

G. A. FINKELNBURG,
For Petitioner.

And afterwards, to wit, on the 30th day of November, 1894, the relator files its further suggestions, which are in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1894.

In the Matter of THE LACLEDE GAS LIGHT COMPANY, Relator.

Petition for Alternative Writ of Mandamus.

To the honorable the judges of the supreme court of Missouri:

The undersigned, of counsel for the Laclede Gas Light Company, respectfully submit the following further suggestions in reply to those submitted by City Counsellor Marshall:

25 The only question before the court is—

Whether this court, therein exercising its unquestioned original jurisdiction, will take cognizance of this application and direct an alternative writ to issue, or will decline to take jurisdiction thereof and remit petitioner to the circuit court.

In State *ex rel. v.* Tracy, 94 Mo., 220, '21, this court said:

"The grant of power to this court to hear and determine writs of mandamus is without qualification, and none exists in the nature of the proceeding. The practice of this court is to decline to issue such writs unless the case is one of more than ordinary importance; but that is a rule of expediency and does not affect the jurisdiction of this court."

Other cases referred to in the memorandum already submitted by Mr. Finkelnburg indicate the class of cases which this court has deemed of sufficient importance for the exercise of its original jurisdiction in order to a speedy determination of the controversy.

The undersigned submit that the suggestions presented by the city counsellor are, for the most part, not germane to the question whether this court will take jurisdiction of this case, but relate rather to questions which can properly arise only after the issue of an alternative writ.

I.

For example, whether the street commissioner, in his official capacity, or the City of St. Louis, as a corporation, should be made defendant in order to obtain the specific relief sought by the relator is clearly not a question of expediency, but of parties to the

26 suit, which cannot properly be determined by the court until suit is brought by issuing the writ.

Relator is advised that the street commissioner and not the City of St. Louis is the proper defendant for the purpose of this application, and is prepared, but only at the proper time and in the proper manner, to submit that question to the court. Mr. Marshall's suggestion that a writ of mandamus from this court will not run against a "mere officer" of a municipal corporation is clearly erroneous, as will sufficiently appear from the case of State *ex rel. v.* May, 106 Mo., 488, in which this court entertained an application for mandamus against the street commissioner of Kansas City as such; also the two cases of State *ex rel. v.* Williams, 96 Mo., 13, and 99 Mo., 291, in which the defendant was the recorder of voters of the city of St. Louis. The suggestion that the term of office of the present street commissioner of St. Louis may expire before the termination of this controversy is also without merit, for the reasons already suggested by Mr. Finkelnburg.

II.

To the suggestion that, because of the great importance of the case to the city of St. Louis and its inhabitants generally, at least thirty days should be allowed the defendant to make return to the alternative writ, the relator interposes no objection; but if the importance and magnitude of the questions involved are a reason why the defendant should have the usual time to prepare its return, they also bring the case within the class of cases of which this court will take jurisdiction precisely on that ground.

27 The further suggestion that the relator by this application claims "a vast monopoly" in the streets of St. Louis is certainly not germane to the question now before the court. That the relator does not claim a monopoly its petition shows. On the contrary, it distinctly disclaims and exclusive right under its charter. But this suggestion, though both unfounded and prematurely made, also emphasizes the importance attached by the officers of the city of St. Louis to this controversy and the consequent propriety of the relator's application to this court.

III.

It is further suggested by the city counsellor as an objection to the granting by this court of the alternative writ that the proper determination of the issues of fact that will arise in this case will necessitate the taking of much testimony not only in Missouri, but elsewhere in the United States and in Germany; but this court has never hesitated on that ground to take jurisdiction of a case whose importance otherwise justified the issue of the writ. In State *ex rel. v.* Williams, 99 Mo., 291, 294, in which relator sought to compel the issue to him by the recorder of voters of St. Louis a certificate of election as marshal of said city, the report shows that a very large amount of testimony was taken on both sides by depositions authorized by the order of this court, and upon that testimony the case was decided. It is evident that the testimony which the city counsellor thinks must be taken in this case can be taken only by depositions. Certainly the court can in this case, as it did in the Williams

case, quite as easily pass upon testimony taken by its own authority as upon testimony taken under a commission issued from the circuit court and preserved in the transcript of the record
28 brought here on appeal. It will be observed, however, that some of the questions mentioned by the city counsellor as "questions of fact" are not questions of fact, but plainly questions of law; for example, "whether this grant of power," namely, the provision in the relator's charter authorizing it to use any substitute for gas, "meant that relator should have the right to construct conduits," &c., is clearly a question not of fact, but of the proper construction of said charter; but this suggestion also is obviously premature and irrelevant to the question now before the court, since it anticipates issues which may or may not be presented in the case; and even if the determination of the controversy should involve, as suggested by the city counsellor, an inquiry "whether electricity is a substance or material in any sense in which those words were known or used by the law-makers in 1857 or at the present date," and if the defendant should be permitted by the court to aid it in construing relator's charter by taking testimony on that subject, and if also it were assumed that whether the court should grant such permission, a question which this court would consider at this stage of the proceeding, still the undersigned submit that these considerations also emphasize the propriety of this application and furnish additional reasons why the final determination of questions which the city counsellor deems so important to the city and its inhabitants should not be still further delayed by requiring the relator to begin its proceedings in the circuit court.

HENRY HITCHCOCK,
I. H. LIONBERGER,
G. A. FINKELNBURG,
Of Counsel for Relator.

29 And afterwards, to wit, on the 10th day of December, 1894, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,
v.
M. J. MURPHY, Resp.

Now, at this day, the court, having fully considered and understood the application heretofore made for an alternative writ of mandamus herein, doth order that said rule issue, directed to said respondent, returnable on the 14th day of January, 1895.

Which said alternative writ of mandamus is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1895.

THE STATE OF MISSOURI on the Relation of THE LACLEDE GAS LIGHT COMPANY,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.

The State of Missouri to Michael J. Murphy, street commissioner of the city of St. Louis:

Whereas the said Laclede Gas Light Company, lately in our supreme court, at the October term, 1894, thereof, held at the city of Jefferson, on the 26th day of November, 1894, gave the same court to understand and be informed, to wit, by the petition of said relator, verified by affidavit, filed in said court on said day, that you, the said Michael J. Murphy, street commissioner of the city of St.
30 Louis, have arbitrarily, unlawfully, and contrary to your duty in that behalf, refused and still refuse to issue to said relator a certain permit by said relator applied for, as will more fully appear by reference to said petition, which is in words and figures following, to wit:

To the honorable judges of the supreme court of the State of Missouri:

The Laclede Gas Light Company, relator herein, gives the court to understand and be informed that it, the said relator, is a body politic duly incorporated by an act of the General Assembly of the State of Missouri, approved March 2d, 1857, entitled "An act to incorporate the Laclede Gas Light Company;" that subsequently said act of March 2d, 1857, was amended by certain supplemental and mandatory acts, viz., "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, and "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 26th, 1868; which said three acts of the General Assembly of the State of Missouri are in words and figures as follows:

An act to incorporate the Laclede Gas Light Company.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and con-
31 vey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purpose of the said corporation and the prosecution of its legitimate business.

SEC. 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

SEC. 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary; said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and, under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

SEC. 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis, for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

SEC. 5. The said company, its successors and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate
32 limits of said city, as established by the act entitled "An act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

SEC. 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said

city fail so to purchase said property and effects, then this
33 charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

SEC. 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

SEC. 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20, of article first of the act entitled "An act concerning corporations," approved November 23, 1855.

SEC. 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

SEC. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before-recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its
34 passage.

Approved March 3, 1857.

An act to amend an act to incorporate the "Laclede Gas Light Company," approved March 2d, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. The said "Laclede Gas Light Company" shall, and may within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SEC. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

SEC. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory, is hereby repealed.

SEC. 4. An act entitled "An act supplementary to and amendatory of an act entitled An act to incorporate the Laclede Gas Light Company," approved March 3d, 1857, is hereby repealed.

SEC. 5. This act shall take effect from its passage.

Approved March 26th, 1868.

35 Said relator further shows to the court that said act of March 2d, 1857, as amended by said subsequent acts, constitutes the present charter of relator, which charter it has duly accepted, under which it has organized and carried on business, and which is in full force and effect; that by said charter relator is granted the privilege and right of lighting the city of St. Louis throughout its corporate limits, and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor relator shall do the same with as much dispatch and as little inconvenience to the public as possible.

And by said charter relator is invested with all other powers necessary to execute and carry out the privileges and powers expressly granted to it; but relator further states and shows to the court that on the 28th day of February, 1873, a certain agreement, known as the "tripartite agreement," was made and executed by and between the city of St. Louis, the St. Louis Gas Light Company, and the Laclede Gas Light Company, to wit, this relator, in and by which agreement, for certain valuable considerations therein set forth, this relator abandoned and surrendered any and all exclusive rights and all claims or pretences of claims of sole or exclusive privilege or right of lighting any part of the city of St. Louis with gas or making or vending gas, gas-lights, or gas-fixtures, and also
36 all exclusive right whatsoever under its said charter.

Relator further states that in pursuance of the terms of said charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of the public streets and alleys of said city by electricity and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of

the city of St. Louis, as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wire strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish light to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to
37 transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service relator has made arrangements to lay its wires under ground along and under the streets of said city according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states that Michael J. Murphy is and was at or before the time hereinafter referred to street commissioner of the city of St. Louis, duly appointed, qualified, and acting as such under its charter, and as such are committed to him under said charter the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

Relator further states that, having completed its preparation to carry out the work above indicated and having given previous notice of its intention to do so to the said street commissioner of the city of St. Louis, it did, on the 30th day of October, 1894, proceed with a number of men required for that purpose to begin the work of excavating at a point on the east side of Broadway, being one of the public streets of said city, near the corner of Mound street, the said point being adjacent to relator's generating plants, which work of excavating was proper and necessary for placing its wires under ground; whereupon a police force of the city of St. Louis,
38 acting under the instruction and at the instigation and request of said Michael J. Murphy, respondent, who was therein acting as street commissioner of said city, stopped relator's men from proceeding with said work and caused relator's employés engaged in said work to be arrested, and said street commissioner, respondent herein, notified relator that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit, previously obtained from him for that purpose, as provided by ordinance; and relator states that by section 568, article 1, chapter 15, of the Revised Ordinance, 1887, of said city of St. Louis, it is provided that "no person shall make or cause to be made any excavation on any public street, highway, or alley without written permission of the street commissioner so to do, excepting public work done under the authority of the water or sewer commissioner, who

at the time of ordering any such excavating shall notify the street commissioner of the same."

That upon being so notified by said respondent, street commissioner as aforesaid, relator applied to said respondent as such street commissioner for a permit to make the necessary excavation on Broadway, so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its said charter rights and privileges, but said street commissioner arbitrarily, unlawfully, and contrary to his duty as such street commissioner in that behalf, refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, and also refused and still refuses to let relator make any such excavation without a permit, and threatens and still threatens to cause the arrest of any person who might thereafter enter upon or begin any such
39 excavation for said purpose of laying any wire of relator's under ground, so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hindrance, viz., to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required in order to carry on the business for which relator's corporation was organized.

Relator states and shows to the court that it was and is the duty of said Michael J. Murphy, as such street commissioner of the city of St. Louis, to issue to it, said relator, a permit such as by it applied for as aforesaid, so that relator may without interference by the police or other authorities of said city exercise its charter powers and rights in that behalf above mentioned.

And relator states that by reason of the premises relator has been and is entirely without remedy in the premises unless it be afforded by the interposition of this honorable court by its writ of mandamus, and it therefore prays that a writ of mandamus may issue against said Michael J. Murphy, street commissioner of the city of St. Louis, commanding him to issue a permit to the relator to make an excavation along the east side of Broadway as near the curb as practicable, and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive street — Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as
40 possible; and relator prays for such other process, orders, and remedies as may to the court seem meet and proper.

THE LACLEDE GAS LIGHT COMPANY,
By ISAAC H. LIONBERGER, *Vice-President.*

HENRY HITCHCOCK,
LIONBERGER & SHEPLEY AND
G. A. FINKELNBURG,
Att'ys for Relator.

STATE OF MISSOURI, }
City of St. Louis, } ss:

Isaac H. Lionberger, undersigned, being first duly sworn, on his oath states that affiant is the vice-president of The Laclede Gas Light Company, the petitioner and relator in this behalf; that affiant has read the foregoing petition and knows the contents thereof, and that the several matters and things in said petition set forth are true to the best of his knowledge and belief.

ISAAC H. LIONBERGER.

Subscribed and sworn to before me this Nov. 23d, 1894.

[NOTARY'S SEAL.] GEORGE M. BLOCK,
Notary Public.

Term expires June 28, 1897.

And whereas, upon consideration thereof, it was ordered that an alternative writ of mandamus should issue:

Now, therefore, you, Michael J. Murphy, street commissioner of the city of St. Louis, are hereby commanded to forthwith issue
41 to the said Laclede Gas Light Company a permit to make an excavation along the east side of the public street called Broadway, in the city of St. Louis, State of Missouri, as near the curb as practicable, and extending from the southeast corner of said Broadway and Mound street to the southeast corner of Broadway and Olive street, in said city, so far as such excavation may be necessary for the purpose of laying under ground the electric wires of said Laclede Gas Light Company, the same to be done with as much dispatch and as little inconvenience to the public as possible, or that you show cause before this court on the 14th day of January, A. D. 1895, why you refuse to do so.

Witness the Honorable Francis M. Black, chief justice of the supreme court of Missouri, the 10th day of December, A. D. 1894. Issued at office, in the city of Jefferson, State of Missouri, under the seal of the said court, the day and year last aforesaid.

[SEAL.] JNO. R. GREEN,
Clerk of said Court.

I acknowledge service of the foregoing writ of mandamus and waive service by an officer.

M. J. MURPHY,
Street Commissioner.

St. Louis, Mo., December 12th, 1894.

And afterwards, to wit, on the 14th day of January, 1895, the further following proceedings were had in said cause, viz:

42 STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel., }
v.
M. J. MURPHY, Resp. }

Comes now the said respondent, by attorney, and files his return to the alternative writ of mandamus heretofore issued herein, and,

upon motion, the said relator is granted 10 days in which to plead to said return.

Which said return is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1894.

STATE OF MISSOURI *ex Rel.* THE LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.

Now comes said respondent, and for return to the alternative writ of mandamus heretofore issued in this case, commanding respondent to show cause why he refuses to issue a permit to relator to make an excavation along the east side of Broadway, from the southeast corner of Mound street and Broadway to the southeast corner of Olive street, in the city of St. Louis, for the purpose of laying electric wires under ground, respectfully represents and shows unto the court that it is true, as stated by relator, that the General Assembly of Missouri, by an act entitled "An act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, and by an
43 act entitled "An act supplementary and amendatory of an act entitled 'An act to incorporate the Laclede Gas Light Company,'" approved March 3d, 1857, the relator became a body corporate; that it is also true that the General Assembly of Missouri passed an act entitled "An act to amend an act to incorporate 'the Laclede Gas Light Company,'" approved March 26th, 1868.

Respondent further shows unto the court that said act approved March 2nd, 1857, constituted James M. Hughes and seven (7) others a body politic and corporate under the style of "the Laclede Gas Light Company," and provided that "by that name they and their successors and assigns shall have perpetual succession," and that said company "shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city as established by an act entitled "An act to incorporate the city of St. Louis," approved February 8th, 1839, have and enjoy during the continuance of this act the sole and exclusive privilege and right of lighting the same and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor, and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company;" that by said act it was further provided that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company under this charter, to pur-
44 chase all the property and effects of the same, paying therefor to the same the value of such property and effects, with

twenty per cent. added thereto, such value to be fixed by two appraisers, one to be chosen by the city and the company, and if they cannot agree, then the two thus chosen shall name a third man, and the decision of any two of the three shall be binding; and upon such purchase being made all such property and effects and all rights and privileges granted to said company shall immediately pass to and vest in said city.

If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof:" that it was further provided by said act that said company should be exempted from the operations of secs. 6, 7, 13, 14, 15, 18, and 20 of art. 1 of an act entitled "An act concerning corporations," approved November 23d, 1855; that it was provided by sec. 9 of said act as follows: "This act shall take effect from its passage and shall continue in force for thirty years."

Respondent further shows unto the court that by the supplementary act approved March 3rd, 1857, it was provided that the words "sole and exclusive," in the 5th section of the act approved March 2d, 1857, should be stricken out, and, further, that the city of St. Louis should not be compelled, in any purchase which it might make under the act of March 2nd, 1857, to pay more than the appraised value of the property and effects without any addition of percentage.

Respondent further shows unto the court that the act ap-
45 proved March 26th, 1868, entitled "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2d, 1857, was as follows:

"SECTION 1. The said 'Laclede Gas Light Company' shall, and may within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have hold and enjoy forever, all the rights, privileges and franchises granted to it by the 5th section of the act to which this act is amendatory, and may at any time lease, sell or dispose of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SECTION 2. The capital stock of said company may be increased, from time to time, to such amount as may be necessary to carry on its business.

SECTION 3. Nothing in this act contained shall be considered as affecting the vested rights of the St. Louis Gas Light Company, and the sixth section of the said act to which this act is amendatory is hereby repealed.

SECTION 4. An act entitled: 'An act supplementary and amendatory of an act entitled "An act to incorporate the Laclede Gas Light Company,"' approved March 3rd, 1857, is hereby repealed.

SECTION 5. This act shall take effect from its passage."

Respondent further shows unto the court that the said act approved March 26th, 1868, is unconstitutional, null and void, and is in conflict with par. 2 of sec. 1 of art. 8 of the constitution of Mis-

public places which said wires, tubes, or cables are to occupy, and the manner in which said wires, tubes, or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes, and cables, and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations, and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for
50 placing such wires, tubes, or cables the same shall be placed in or under alleys and not along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said ordinance No. 16894, nor has it ever been authorized by the municipal assembly of St. Louis to place its wires, tubes, and cables under the streets or alleys of St. Louis.

Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the city of St. Louis had the right to adopt and enact under par. 2 of sec. 26 of art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, and so forth, in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has or may heretofore have had by virtue of any act of the General Assembly of the State of Missouri.

Respondent further shows unto the court that relator has never made application to the board of public improvements for a permit to place its wires, tubes, and cables under ground in said city, nor has it complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case.

Respondent further shows unto the court that on the 2nd of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the act of March 2nd, 1857, did not and did not intend to confer upon relator the right to manufacture electricity for lighting purposes.

Respondent further shows unto the court that it is like-
51 wise true that on the 26th of March, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator by the act of March 26th, 1868, the right to manufacture and vend electricity for lighting purposes.

Wherefore, having fully made return to the alternative writ herein, respondent asks to be hence dismissed with his costs.

W. C. MARSHALL,
Att'y for Respondent.

And afterwards, to wit, on the 24th day of January, 1895, the said relator files its special demurrer to parts of respondent's return, which is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1894.

THE STATE OF MISSOURI *ex Relatione* THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.
No. 7434.

Now comes relator, by its attorneys of record, and demurs specially to the following portions of the return of said respondent to the alternative writ of mandamus issued in this behalf and to each of them—that is to say:

52 1. To that portion of said return beginning, on line 6 of page 4 thereof, with the words "Respondent further shows unto the court that the said act, approved March 26, 1868," and ending, on line 26 of said page 4, with the words "was an act reviving and re-enacting the act of March 2, 1857."

And for grounds of said demurrer relator shows the court—

That the said act approved March 26, 1868, as by the terms thereof appears, is not, nor purports to be, a law reviving or re-enacting any act theretofore passed, and is not, therefore, within the provisions of nor in conflict with paragraph 2 of section 1 of article 8 of the constitution of Missouri, 1865; also—

That even if the said act approved March 26, 1868, had been a law reviving or re-enacting any act theretofore passed creating any private corporation, yet relator says that its charter, to wit, the said act of March 2, 1857, was not nor is within the provisions of paragraph 2 of section 1 of article 8 of the constitution of Missouri of 1865, because the said act of March 2, 1857, by which, as set forth in relator's petition herein and admitted in said respondent's return, James M. Hughes and others were, at and from the date of the approval of said act, constituted a body politic and corporate under the style of the Laclede Gas Light Company, did not prescribe any time within which said corporation should be organized or commence the transaction of its business, but, on the contrary, to wit, by section 8 of said act, expressly exempted the said Laclede Gas Light Company and the said charter thereof from the operation of sections 6 and 7 of article first of the general

53 law of the State of Missouri concerning corporations then in force, to wit, sections 6 and 7 of "An act concerning corporations," approved November 23, 1855. Wherefore relator says that from and after the approval of said act approved March 2, 1857, the said Laclede Gas Light Company, to wit, this relator, was and continued to be completely vested with all and singular the corporate rights and powers in its said charter mentioned, without any limitation as to the time of its organization or of commencing the transaction of its business, and that said charter was a contract by the State of Missouri with said corporation, in virtue whereof the said charter and the corporate powers therein granted were not subject to alteration, suspension, or repeal by any subsequent legislation on the part of said State.

Wherefore relator says that the matters averred in said portion of said respondent's return above mentioned constitute no defense to this proceeding.

Relator further demurs:

2. To that portion of said return on pages 4, 5, and 6 thereof, beginning on page 4 with the words "Respondent further shows unto the court that said act of March 26, 1868, is null and void" and ending, on line 4 of page 6, with the words "as if it were an original act or provision."

And for grounds of said demurrer relator shows the court—

That said act of March 26, 1868, was not nor by its terms purported to be an act reviving or re-enacting said act of March 2, 1857, but was and purported to be an act to amend said act of March 2, 1857, which act last mentioned was at the date of said amendatory act in full force.

54 That said amendatory act of March 26, 1868, was in no respect in conflict with the provisions of section 25 of article 4 of said constitution of Missouri, 1865, nor failed in any respect to comply with an- provision thereof concerning amendments such as therein referred to or which required the setting forth or publishing at length such amendments.

That said act of March 26, 1868, did not amend nor purport to amend said act of March 2, 1857, by providing that any designated words thereof should be struck out, or that designated words should be struck out and others inserted in lieu thereof, and was not in conflict with the provisions of said section 25 of article 4 of said constitution of Missouri of 1865 or any of them, but was a valid amendment, to wit, to the extent of and in accordance with its terms of the said act approved March 2, 1857.

Wherefore relator says that the matters averred in said portion of respondent's return last above mentioned constitute no defence to this proceeding.

Relator further demurs:

3. To the following portion of said return, contained in lines 5 to 9, inclusive, on page 6 thereof, to wit:

"Respondent further shows unto the court that the charter of the relator, by the terms of sec. 9 of the act of March 2nd, 1857, expired on the 2nd of March, 1887, and that relator therefore is not entitled to any of the privileges, rights, or franchises claimed by it"

Because the averments therein contained constitute no defence to this proceeding, for that the construction therein sought to be
55 placed by respondent upon said act of March 2, 1857, is erroneous and is not consistent with the other provisions of said act as set out in relator's petition and admitted in said respondent's return, nor with other material averments in said return contained.

Because section 6 of said act of March 2, 1857, which authorized the city of St. Louis, at the expiration of twenty years from the time of the organization of said company, to wit, this relator, under said charter to purchase all the property and effects of said company upon terms therein stated, further provided that if said city should fail so to purchase said property and effects, then said char-

ter should be, and the same was thereby, renewed and extended for the period of thirty years after the expiration thereof; and it does not appear nor is by respondent in said return alleged that the city of St. Louis has ever purchased or offered to purchase the property and effects of relator or any part thereof, as by said section 6 authorized.

Relator further shows the court—

That if the act approved March 26, 1868, amending said act of March 2, 1857, was and is null and void, as by respondent in his said return alleged, then said section 6 of said act of March 2, 1857, was not repealed thereby, but remained in force; and since it does not appear nor is averred in said respondent's return that the said city of St. Louis ever purchased or offered to purchase the property or effects of relator, the charter of said relator, to wit, the said act of March 2, 1857, and all rights and privileges thereby granted to relator were by the express provisions of said section 6 thereof renewed and extended for thirty years after the expiration of the period mentioned in section 9 of said act of March 2, 1857,
56 to wit, until March 2, 1917, and are now still in force.

But if, as relator contends, said act of March 26, 1868, was and is a valid act, in amendment of said act of March 2, 1857, then relator was and still is entitled under said act of March 2, 1857, as so amended, to exercise, have, hold, and enjoy all and singular the corporate rights, privileges, and franchises granted by its said charter as so amended.

Wherefore relator says that in any event its charter is and remains in full force, and said portion of said return last above mentioned sets forth no defence to this proceeding nor any reason why relator should not have the relief sought herein.

Relator further demurs:

4. To that portion of said return beginning with the words "and that it is provided by article 2, chap. 15, rev. ordinance of the city of St. Louis, 1887," in line 7 of page 7 of said return, and ending with the words "as is asked for by relator in this case."

And for grounds of said demurrer relator shows the court—

That by the terms of said act to incorporate the Laclede Gas Light Company, approved March 2, 1857, being the original charter of relator, as set forth in said alternative writ and admitted by said respondent's return, special reference being had to section 8 of said act, the said charter was and is a contract between the State of Missouri and said corporation, not subject to alteration, suspension, or repeal except with the consent of said corporation, and that any constitutional provision, law, or municipal ordinance adopted
57 or enacted after said date, by or by authority of said State or by any municipality thereof, inconsistent with any right, privilege, or franchise granted by said charter to relator or the effect of which would be to deny to relator any such right, privilege, or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter would be in contravention of section fifteen of article 2 of the constitution of Missouri, 1875, forbidding the General Assembly to pass any law

impairing the obligation of contracts, and also of section 10 of article I of the Constitution of the United States, forbidding any State to pass any such law.

That the provisions of said ordinance of said city of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said State of Missouri, contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it certain conditions and requirements not prescribed by said charter and which it does not appear nor is by respondent averred that the relator has ever consented to or accepted.

Wherefore relator says that the matters averred in said portion of respondent's return last mentioned do not, nor does any of said matters, constitute any defence to this proceeding nor any reason why the relief here sought should not be granted.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
ISAAC H. LIONBERGER,
Attorneys for said Relator.

38 And also files its motion to strike out parts of respondent's return, which said motion is in words and figures as follows, viz:

In the Supreme Court of Missouri, October Term, 1894.

THE STATE OF MISSOURI *ex Relatione* THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.
No. 7434.

Now comes said relator and moves the court to strike out the following portions of respondent's return to the alternative writ in this behalf, to wit:

1. That portion of said return contained in lines 10 to 21, on page 6 thereof, as follows:

"For further and separate return respondent shows unto the court that, even conceding all that relator claims with reference to the validity of the act of March 26th, 1868, and of the act of March 2nd, 1857, nevertheless relator is not entitled to the relief asked for in this case, because respondent says that it has never by any act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges, and franchises it ever enjoyed were confined to making and vending gas, gas-lights, gas-fixtures, and any substance or material used as a substitute therefor, and that electricity, whether used for lighting or power purposes, is not a substance or material, and hence relator has not any right to make or vend the same anywhere."

59 And for grounds of said motion relator shows to the court—

That the matters averred in said portion of said return are immaterial and not responsive to the averments in relator's petition or the relief sought therein; but, on the contrary, respondent attempts thereby to tender a false and immaterial issue in respect of the rights alleged and relief sought by relator in and by its petition in this behalf:

Forasmuch as the privilege and right which relator seeks by this proceeding to enforce, as by its said petition appears, is the said right of relator, under its said charter, to establish and lay down in the streets of the city of St. Louis all pipes, fixtures, or other thing properly required in order to carry on the business of lighting the city of St. Louis and the business of making and vending gas, gas-lights, gas-fixtures, and any substance or material which at the date of said charter was or thereafter might be used as a substitute therefor, and especially the right, which relator claims under said charter, to lay down under said streets, in pipes or conduits suitable therefor, wires by means of which to transmit currents of electricity for the production of electric light as a substitute for gas-light.

Relator further shows to the court that it is a matter of common knowledge, and of which relator submits that the court will take judicial notice, that in making or producing gas-light by means of ordinary illuminating gas the carbon, which is a component part or element of such gas, is brought to a condition of incandescence by the application of heat, and it is also a matter of common
60 knowledge, of which the court will take judicial notice, that in making or producing electric light, which for years past has been and is now largely used as a substitute for gas-light, the carbon, which is used for arc lights in the form of rods or pencils and for incandescent lamps in the form of a thread or filament, is brought to a condition of incandes-cence by generating and transmitting through said carbon what is called electricity, the light or illumination produced in either case being, as is commonly known, the result of the incandescent condition of the carbon used and the effect thereof upon the organs of sight.

That, as averred in the petition of relator herein and not denied in said respondent's return, relator has for a long time past carried on the business of making and vending to the city of St. Louis under a contract with said city therefor, and to many of the inhabitants thereof, as a substitute for gas-light, what is called electric light—that is to say, light radiating from carbon rods or carbon filaments heated to incandescence by means of electricity, as above mentioned, instead of light radiating from particles of incandescent carbon in the flame of burning gas, thereby substituting one form of incandescent carbon for another form thereof, each of said forms of carbon being a substance or material within the meaning of relator's charter and within the corporate rights and powers thereby conferred on relator; and relator says that in proposing, as in its said petition set forth, to establish and lay down in the streets of St. Louis a sys-

tem of wires strung or laid in under-ground pipes or conduits as a substitute for the overhead wire strung on poles along said streets, hitherto used by it, so as by means of said under-ground wires
61 more conveniently and safely to transmit or convey to such carbon rods or filaments currents, which, as admitted by respondent's return, it is necessary to convey by means of wires strung either on poles or in under-ground conduits in order to make said carbons incandescent, thereby producing electric light as a substitute for gas-light, relator proposes to substitute for the gas pipes and fixtures, which formerly were alone used by it in carrying on the business authorized by its charter, pipes or conduits and wires such as properly required for said purpose: also are lamps and carbons used therefor, and incandescent lamps and carbon filaments which are a necessary part thereof, each and all of which pipes or conduits, wires, arc or incandescent lamps, and carbon rods or filaments respectively relator avers are substances and materials within the meaning and intent of said charter of relator.

Wherefore relator says that whether what is called electricity, by means whereof said carbon rods and filaments are rendered incandescent and caused to radiate light as aforesaid, is or is not a substance or material is an issue wholly foreign and immaterial to the questions arising upon the said alternative writ—that is to say, as to the right of relator under its charter to make and vend electric light as a substitute for gas-light and its right, for that purpose, to make use of incandescent carbon in the form of rods or filaments as a substitute for incandescent gas and to use arc and incandescent lamps with carbon rods or filaments as a substitute for gas-fixtures and, to that end, in lieu of and as a substitute for under-ground gas-pipes and gas-fixtures and apparatus connected therewith to establish and lay down in the streets of said city of St. Louis such pipes or conduits as may be properly required for the maintenance of wires for the transmission of electricity—inasmuch as relator
62 avers that the determination of that question or pretended issue would not in any manner assist or enable this court to adjudicate or pass upon any right in this behalf alleged or claimed by relator; and the said portion of said respondent's return should therefore be disregarded and stricken out as immaterial.

2. Also that portion of said respondent's return contained in lines 3 to 6, inclusive, on page 7 thereof, as follows:

"That it is provided by sec. 2721 of art. 5 of chap. 42, Rev. Stats., 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city through the municipal authorities thereof."

And for grounds thereof relator shows the court—

That the said provision alleged by respondent to be part of section 2721 of article V, chapter 42, of the Revised Statutes of Missouri, 1889, does not truly or correctly set forth the purport or intent of the statutory provision therein referred to, in this: that the provisions of said section 2721 by their terms expressly relate only to telegraph and telephone companies organized under the provisions of said article V, chapter 42, of said Revised Statutes of 1889

and do not relate nor purport to relate in any manner to any corporation except telegraph or telephone companies, nor to any such companies except such as shall have been organized under the provisions of said article V of said chapter 42 of said Revised Statutes.

Wherefore relator says that said portion last mentioned of said return is irrelevant and immaterial to any question involved in this proceeding and constitutes no defence thereto.

3. Also that portion of said respondent's return contained
63 in lines 18 to 22, inclusive, on page 8 thereof, as follows:

"Respondent shows to the court that on the 2nd of March, 1857, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri, by the act of March 2, 1857, did not and did not intend to confer upon relator the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion relator shows to the court—

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf and constitutes no defence to said alternative writ or to the relief sought by relator in this proceeding:

Because it appears from the terms of said act of March 2, 1857, that the State of Missouri thereby, to wit, by the fifth sections of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas-lights, or gas fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

4. Also that portion of respondent's return contained in lines 23 to 28, inclusive, on page 8 thereof, as follows:

Respondent further shows unto the court that it is likewise true that on the 26th of March, 1868, lighting by electricity was wholly
64 unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator, by the act of March 26, 1868, the right to manufacture and vend electricity for lighting purposes."

And for grounds of said motion relator shows the court—

That said portion of said return last mentioned is immaterial and irrelevant to the questions presented by relator's petition and the alternative writ in this behalf and constitutes no defence to said alternative writ or to the relief sought by relator in this proceeding:

Because it appears from the terms of said act of March 2, 1857, that the State of Missouri thereby, to wit, by the fifth section of said act, expressly granted to relator the corporate right and privilege of making and vending gas, gas-lights, or gas-fixtures, and any substance or material that might then or thereafter be used as a substitute therefor, without annexing to such right any condition that such substitute should be only such as was known to art at the date of the approval of said act.

And it further appears from the terms of said act of March 26, 1868, by which said act of March 2, 1857, was amended, as set forth in relator's petition, that all the rights, privileges, and franchises

granted to said relator by said *fifth* section of said act of March 2, 1857, were by said amendatory act of March 26, 1868, confirmed to relator without annexing to any such right, privilege, or franchise any condition that such substitute should be only such as was known to art at the date of the approval of said amendatory act.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
ISAAC H. LIONBERGER,
Attorneys for said Relator.

65 And afterwards, to wit, on the 5th day of February, 1895, the following further proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS. L. Co., Rel.,)
v.
M. J. MURPHY, Resp.)

Now, at this day, it is ordered by the court that this cause be set for hearing February 19, 1895.

And afterwards, to wit, on the 19th day of February, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,)
v.
M. J. MURPHY, Resp.)

Now, at this day, it is ordered by the court, on its own motion, that this cause be transferred to the court in banc.

And afterwards, to wit, on the 26th day of February, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,)
vs.
M. J. MURPHY, Resp.)

Now, at this day, it is ordered by the court that this cause be set for hearing on March 19, 1895.

And afterwards, to wit, on the 19th day of March, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO, Rel.,)
v.
M. J. MURPHY, Resp.)

Now come the said parties, by attorneys, and, after argument herein, submit this cause to the court, and upon motion it
66 is ordered by the court that the said relator be granted 10 days in which to file additional briefs.

And afterwards, to wit, on the 18th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE OF MISSOURI at the Relation of THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent. } Mandamus.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the peremptory writ of mandamus prayed for herein be, and the same is hereby, denied, and that the said respondent recover against the said relator his costs and charges herein expended, and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows:

In the Supreme Court of Missouri, April Term, 1895. In Banc.

STATE *ex Rel.* THE LACLEDE GAS LIGHT COMPANY, Relator,
v.
MICHAEL J. MURPHY, Street Commissioner of St. Louis, Respondent.

67 On the petition of relator an alternative writ of mandamus was issued by this court, directed to respondent Murphy, as street commissioner of the city of St. Louis, commanding him to show cause why he should not be required to issue a permit to relator to make an excavation along the east side of Broadway, as near the curb as practicable, and extending from Mound street to Olive street, in the city of St. Louis, in so far as such excavation should be necessary for the purpose of laying relator's electric wires under ground.

By its petition relator represents that it is a corporation created under an act of the legislature of the State approved March 2nd, 1857, and a supplementary and amendatory act approved March 2nd, 1857, and a supplementary and amendatory act approved March 3d, 1857, and an amendatory act approved March 26th, 1868.

These acts are set out in full in the petition. The first, approved March 2nd, 1857, is entitled "An act to incorporate the Laclede Gas Light Company."

The first section of the act creates James M. Hughes and seven others a body politic and corporate, by the style of "The Laclede Gas Light Company, and by that name they and their successors and assigns are given perpetual succession," etc.

The second section fixed the capital stock at fifty thousand dollars and authorized it to be increased to two millions.

The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc.

The fourth section authorized books of subscription for the capital stock to be opened in St. Louis, and, upon the sum of fifty thousand dollars being subscribed, provides that the company may organize under this charter.

68 Section five provides that said company, its successors, and assigns should, within the corporate limits of said city, not embraced within the limits as established by act of 1839, "have and enjoy during the continuance of this act the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may now or hereafter be used as a substitute therefor, and to that end may establish and lay down in said portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

Section six authorized the city of St. Louis and the company to make any contracts that they may deem to their mutual advantage in regard to the lighting of any parts of said portion of said corporate limits or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right at the expiration of twenty years from the time of the organization of said company under this charter to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent. added thereto, and the manner of ascertaining the value by appraisers is provided. Said section has this further provision: "If said city so fail to purchase said property and effects, then this charter shall be, and the same is hereby, renewed and extended for the further period of thirty years after the expiration thereof."

69 Section 7 punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges by a forfeit and fine to said company of one thousand dollars for every such offense and makes each day's continuance of such offense a new offense.

Section eight exempts the company from the operation of sections 6, 7, 13, 14, 15m, 16, and 20 of art. 1 of "An act concerning corporations," approved November 23d, 1855. The sections of the act of November 23d, 1855, here referred to, are contained in chap. 34, Rev. Stats. 1855, pp. 371 to 374.

Section nine is as follows: "This act shall take effect from its passage, and shall continue in force for thirty years."

The act of March 3rd, 1857, is as follows:

"An act supplementary and amendatory of an act entitled An act to incorporate the Laclede Gas Light Company."

"Be it enacted by the General Assembly of the State of Missouri as follows:

SEC. 1. The act to which this act is amendatory is hereby amended so that the words "sole and exclusive," in the fifth section of the act are stricken out.

SEC. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before-recited act, to pay more than the appraised value of the property and

effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage."

The act of March 26, 1868, was entitled "An act to amend an act to incorporate the Laclede Gas Light Company," approved March 2nd, 1857, and is as follows:

70 SECTION 1. The Laclede Gas Light Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

SEC. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

SEC. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gaslight Company, and the sixth section of said act, to which this act is amendatory, is hereby repealed.

SEC. 4. An act entitled An act supplementary to and amendatory of an act entitled An act to incorporate the Laclede Gaslight Company, approved March 3, 1857, is hereby repealed.

SEC. 5. This act shall take effect from its passage.

Relator represents further that under the charter rights granted by these general acts it is and for a long time has been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of its public streets by electricity; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter

71 it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the city of St. Louis, as it was at all times authorized to do by its charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires, strung upon poles along the streets and alleys of said city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity as well *as* to furnish light to private consumers as for the fulfillment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power,

which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires under ground along and under the streets of said city, according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

Relator states further that respondent was street commis-
72 sioner of said city, and under its charter and ordinances had supervision and control of its streets and the enforcement of ordinances relating thereto. That after notice to said commissioner of its intention to do so on the 30th day of October, 1894, the relator commenced excavating on said streets for the purpose of laying its electric wires under ground, but was prevented from so doing by respondent, acting in his capacity of street commissioner; that thereupon relator applied to respondent for a permit to make such excavation for such purposes, which was denied him.

Respondent made return to said writ and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return and motion to strike out other parts the following issues of law were fairly framed:

First. Is the act of March 26th, 1868, unconstitutional as being in conflict with section 2, article 8, of the constitution of Missouri of 1865?

Second. Is said act void as being in conflict with section 25 of article 4 of said constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2nd, 1857?

Fourth. Do the powers granted relator include the right to manufacture, sell, or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities
73 and without compliance with the requirements of the valid ordinances of the city?

I. The object to be accomplished by the writ is to require Murphy, as street commissioner of the city of St. Louis, to issue to relator a permit to make such excavations on one of the public streets of the city as may be necessary for the purpose of laying its electric wires under ground. The constitutionality of the acts under which relator claims corporate *exists* is put in issue by the answer of respondent and demurrer thereto. Respondent also charges that, though the acts of incorporation itself were valid, in the first instance, the life of the corporation has expired by limitation of its existence as fixed by the charter and general laws of the State.

The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do

not directly concern the duties of the street commissioner. We will not, therefore, consider or express an opinion upon any question involving the right of relator to exercise the rights or enjoy the franchises which appear to have been granted under the acts of the General Assembly mentioned in the statement.

For the purpose of discussing the other questions involved, we will then assume, without deciding or intimating an opinion, that relator is an existing corporation possessi*on* all the powers, rights, and privileges its charter purports to confer upon it.

It is insisted by relator that under its charter it acquired from the State a vested right to the use of the streets *of the streets*
74 of the city of St. Louis under which to lay its pipes for the transmission of gas or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authorities; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the surface of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right cannot be interfer*e*d with unreasonably by the city.

With the views we take of this question we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has for a number of years, under contracts with the city, been lighting its streets by electricity conducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such inquiry. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city.

Generally speaking, it is true the legislature has supreme control of the streets of cities. It is also true that it may and generally does delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities.

Subsequent to the act of 1868, under authority of the constitution of 1875, the city of St. Louis adopted a charter whereby the State delegated to it the power to regulate the use of its streets and
75 the power to pass all ordinances not inconsistent with the provisions of the charter or the laws of the State as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures.

In pursuances of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city and requiring the assent of the board of public improvement in respect to the manner in which electric wires, tubes, and cables should be secured or supported and insulated. It is charged in the return and admitted by the demurrer that relator had never complied with the requirement of this ordinance. Relator insists that the provis-

ions of the ordinance cannot apply to rights secured to it by the State long prior to the date of the charter.

It is the well-settled present policy of the law of this State to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the constitution prohibits the legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets. Sec. 20, art. 12, const. of Mo.

Again, the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise the right to lay their wires and other fixtures under ground in any of its streets. R. S. 1889, sec. 2721.

76 Electric wires when charged are recognized as being dangerous to life and property, and their use is therefore subject to police regulations. W. U. Telegraph Co. *v.* Philadelphia, 21 Am. & Eng. Corp. Cas., 40 & note; Dill. Munic. Corp., sec. 698.

The State cannot limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of the State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." Stone *v.* Mississippi, 101 U. S., 817. See Boyd *v.* Alabama, 94 U. S., 645; Metropolitan Bd. *v.* Barrie, 34 N. Y., 657; Railroad *v.* Mayor of Balt., 77 Md., 381.

Dillon says, "The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever without his consent nor can it be taken for any public use without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to unreasonably injure others, and that the sovereign authority may by police regulations so direct the use of it that it shall not prove pernicious to his neighbors or the citizens generally." Dill. Munic. Corp.

The grant by the State to relator, though construed to include the right to use electricity for illuminating purposes, in respect to such right, was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis.

77 Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

II. But this is not the only reason why the city should not, under its special power to regulate the use of its streets and under its general police power, have the right to supervise and regulate the manner in which electric wires of relator and all others should be placed and used in the public streets.

The art of producing light by electricity was wholly unknown to

science at the time the franchise was granted to relator. The legislature, having no knowledge of the use that would be made of streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right, under the general words used in the act of incorporation, to use electricity for lighting purposes, but that it also had the right to *use electricity for lighting purposes, but that it also had the right to* adopt its own methods for exercising that power regardless of the paramount rights of the public to the use of the streets.

The powers delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or, at least, before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use.

The following declaration of law was quoted approvingly in Carroll *v.* Campbell (108 Mo., 559): "It is a well-settled rule of construction of grants by the legislature to corporations, whether
78 public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." Fanning *v.* Gregoire, 16 How., 534.

There seems to me much stronger reason for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open and when the rights and safety of the public are more or less affected by either. In such case where the public streets of a city which are under municipal control are to be used it seems too plain for argument that the city should have the right to direct the manner in which the use should be exercised.

Again, it is a matter of common knowledge that electricity is used for the purpose of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public and have become necessary to the business and convenience of the country, and particularly that transacted in the large cities. Overhead electric wires in some streets are numerous. These contribute very materially to public convenience and private business, but when not properly supervised and regulated endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control.

It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the
79 interest of public safety as well as convenience, that these wires should be placed under ground, so as thereby to leave the streets safe and unobstructed.

As a police regulation, we have no doubt the municipal authorities would have the right to require this to be done in case no

vested rights were infringed. Many corporations and companies, doubtless, now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wire shall be placed under ground. Without such regulation relator or any other corporation using electric wires could place them under ground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease, or dispose of any portion of said rights, privileges, and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits named. Thus, under this charter allowing the rights herein claimed it could practically control the use of the streets in respect to laying electric wires under ground and exclude the city from one of the most important of its municipal powers. The legislature could never have contemplated such a result.

By giving the city the right to regulate the laying of electric wires under ground relator is deprived of no vested right. If its
80 charter gives it the right to use electricity for lighting purposes it can do so, as we understand from the petition it has been doing in the method now in use in said city. If the city should determine that public safety requires these wires to be placed under ground and provides the manner in which it shall be done and relator believes its rights are thereby infringed, it will then be time enough to complain.

As the case is now presented we must hold that the city, under its power to regulate the use of streets and under its general police power, has the right to require a compliance with regulations which neither wholly prohibit relator from laying its wires under the streets or which regulate the manner in which it may be done.

Respondent, under his official duties as street commissioner, properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied. All the judges concur. Barclay, J., in the result.

G. B. MACFARLANE, *Judge.*

And afterwards, to wit, on the 21st day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Rel.,)
v.)
M. J. MURPHY, Resp.)

Comes now the said relator, by attorney, and files its motion to modify the judgment herein.

Which said motion is in words and figures as follows, to wit:

81 In the Supreme Court of Missouri, April Term, 1895.

STATE OF MISSOURI at the Relation of THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.

No. 7434. Court in Banc.

Now comes relator and moves the court to modify the judgment heretofore entered in this cause, to wit, on the 18th day of June, 1895, so as to allow relator to plead to or traverse respondent's return in accordance with the usual practice in cases of mandamus and as provided by the statutes of Missouri applicable thereto.

And for grounds of this motion relator says that the argument and decision were upon a demurrer to parts of the return and a motion to strike out other parts thereof; that the effect of the decision rendered by this court on the 18th day of June, 1895, is to overrule the demurrer as well as the motion and to leave to relator the alternative right of letting judgment go upon the pleadings as they stand or to plead over; but relator desires to plead over before a final judgment is entered, for the reason that relator wishes to set out in full the city ordinances referred to in respondent's return, which have not been set out in the pleadings as they now stand, and also for the reason that by the demurrer relator constructively admits certain allegations of fact which it desires to deny, so that if relator should determine to sue out a writ of error from the United States Supreme Court it may have the benefit of a

82 complete and proper record in the cause.

Because, reference being had to the state of the pleadings in said cause and to the statute in such case provided, relator respectfully suggests to the court that the said final judgment rendered on the 18th day of June was prematurely and improvidently rendered.

THE LACLEDE GAS LIGHT COMPANY, *Relator*,
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Its Attorneys.

Received at St. Louis, Missouri, this 21st day of June, 1895, a copy of the above motion, with notice from said relator that said motion will be called up and submitted to said supreme court at nine o'clock in the forenoon of Tuesday, June 25, 1895, or as soon thereafter as counsel can be heard; which notice is hereby accepted.

W. C. MARSHALL,
Attorney for M. J. Murphy, Respondent.

And afterwards, to wit, on the 25th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Street Commissioner, etc., Respondent.

Now, at this day, the court, having fully considered and
83 understood the motion heretofore filed to modify the judgment heretofore entered herein and to allow the relator to plead to the return herein, doth ordered that the judgment entered herein on the 18th day of June, 1895, be, and the same is hereby, set aside; that the demurrer to the return and motions to strike out parts thereof are overruled, and that leave is granted relator to plead to the return within five days from June 25, 1895, and this cause is continued.

And afterwards, to wit, on the 28th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Respondent.

Now, at this day, comes the said relator, by attorney, and files its traverse to the respondent's return herein.

Which said traverse is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1895.

STATE *ex Rel.* LACLEDE GAS LIGHT COMPANY, Relator,
vs.
M. J. MURPHY, Street Commissioner, Respondent. — No. 7434.

Now comes said relator, by its attorneys of record, and, by
84 leave of court first obtained therefor, for its plea to the return of said respondent in the above-entitled cause says—

That it, said relator, is advised, and therefore avers, that the said act approved March 26, 1868, is not unconstitutional, null, or void and is not in conflict with any provision contained in article VIII of the constitution of Missouri, 1865.

Relator avers that said act of March 26, 1868, was and is a valid amendment of the act approved March 2, 1857, mentioned in said respondent's return, by which relator was incorporated, and in virtue of its said charter as amended by said act of March 26, 1868, relator is vested with and entitled to hold and enjoy all the corporate franchises, rights, and powers thereby granted.

Relator further shows the court that by section 8 of said act of March 2, 1857, it was provided that the said Laclede Gas Light Company and the said act incorporating the same were and should be exempted from the operation of sections (6) six, (7) seven, (13) thirteen, (14) fourteen, (15) fifteen, (18) eighteen, and (20) twenty of article I of the act entitled "An act concerning corporations," approved November 23, 1855.

Relator states that section 6 of said act of November 23, 1855, was in the words and figures following, to wit:

"SECTION 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation its corporate powers shall cease."

And section 7 of said act of November 23, 1855, was in the words and figures following, to wit:

"SECTION 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to sus-
85 pension, alteration and repeal in the discretion of the legislature."

Relator is advised and avers that being so exempted, to wit, by section 8 of said act of March 2, 1857, from the operation of said section 6 of said act of November 23, 1855, said corporation was not required to organize nor to commence business within one year from the date of its incorporation, nor was any time prescribed in its said charter, to wit, said act of March 2, 1857, or in said amendatory act of March 26, 1868, for such organization and commencement of business; and relator further shows the court that by reason of the provision in section 8 of said act of March 2, 1857, also exempting said corporation from the operation of said section 7 of said act of November 23, 1855, relator's said charter became and was a contract between the State of Missouri and the said corporation, which was not nor is subject to alteration, suspension, or repeal by said State of Missouri or by any legislative act or provision of the constitution thereof subsequently adopted except with the consent of said corporation, and that in virtue of the provisions contained in its said charter, to wit, said act of March 2, 1857, and especially in sections 1 and 4 thereof, the corporators and stockholders of said corporation had the right under said charter to organize said corporation and to commence the transaction of its business at any time after the said act of March 2, 1857, took effect, without reference to the provisions of said act of November 23, 1855, and without reference to any act of the General Assembly or any provision of the constitution of said State which might thereafter be enacted or adopted.

86 Relator further avers that prior to the passage of said act of March 2, 1857, the St. Louis Gas Light Company was incorporated by an act of the General Assembly of the State of Missouri, approved February 4, 1837, entitled "An act to incorporate the St. Louis Gas Light Company," and that said act was amended by an act of the General Assembly, approved February 11, 1839, entitled "An act to amend the charter of the St. Louis Gas Light Company."

That by the charter of said St. Louis Gas Light Company as amended said company had the sole and exclusive privilege and right of vending gas-lights in the city of St. Louis and its suburbs for a period of twenty-five years from and after the first day of January, 1840, and in the event that the city of St. Louis did not resolve to purchase its property for a further period of twenty-five years or until the first of January, 1890.

That on said 2nd day of March, 1857, and for many years thereafter and until the year 1873 said charter of the St. Louis Gas Light

Company was in full force and effect, and relator was thereby precluded from selling gas and gas-light in said city without the consent of said St. Louis Gas Light Company, which consent was not obtained until the year 1873, and therefore relator did not begin to manufacture and sell gas until said year 1873.

Wherefore relator says that the several averments in said respondent's return contained in respect of the time when, as alleged, it, said relator, organized as a corporation and in respect of the time when it commenced the transaction of business constitute no defence to this proceeding.

87 Relator denies that it, said relator, did not organize as a corporation within one year from the time when said act of March 2, 1857, took effect. On the contrary relator avers that within one year from the time said act of March 2, 1857, took effect and during the year 1857 the persons named as corporators in said act held a meeting in the city of St. Louis, Missouri, for the purpose of accepting said charter and organizing said company under said act; that all the corporators named in said act were present at said meeting, and the said corporators then and there, to wit, in said city of St. Louis, did accept said charter and open books for subscriptions to the capital stock of said company and the sum of ($50,000) fifty thousand dollars was then and there, to wit, by said corporators and others, subscribed for the stock of said corporation, being the entire amount of the capital stock of said corporation authorized by said act, and the said subscribers and stockholders did thereupon, to wit, at said meeting, organize said company by electing five directors of said corporation from among said stockholders thereof; also electing a president and secretary of said corporation from among said directors; and relator denies that the said corporation did not commence business until the year 1873, and, on the contrary, avers that it commenced business long before the year 1873.

Relator further avers that said act of March 26, 1868, is not null or void nor is in conflict with any provision contained in article IV, section 25, of the constitution of Missouri 1865, as in said return alleged; that said act of March 26, 1868, is not an act reviving an act of March 2, 1857, nor is an act re-enacting said act of

88 March 2, 1857, nor does said act of March 26, 1868, revive or re-enact or purport to revive or re-enact said act of March 2, 1857, by mere reference to the title thereof, nor does said act of March 26, 1868, amend or purport to amend said act of March 2, 1857, by providing that designated words thereof shall be struck out or that designated words shall be struck out and others inserted in lieu thereof.

Wherefore relator says that the several averments in said respondent's return setting forth the grounds upon which, as alleged, the said act of March 26, 1868, violates section 25 of article IV of the constitution of Missouri 1865, and is therefore null and void are and each of them is immaterial and irrelevant and constitute no defence to this proceeding, and denies each and every one thereof.

Relator denies that by the terms of section 9 of the said act of March 2, 1857, the charter of relator expired on the 2nd of March,

1887, as in said return alleged; and relator avers that although, as hereinbefore stated, the said Laclede Gas Light Company was duly organized as a corporation in and during the year 1857 in pursuance of the provisions of said act of March 2, 1857, the said city of St. Louis did not at the expiration of twenty years from the time of the organization of said company nor at any time purchase or offer to purchase the property and effects of said company or any part thereof.

Relator is advised and avers that even if the averment in respondent's return, to wit, that electricity is not a substance or material, were true, which relator denies, said averment is irrelevant and immaterial and constitutes no defence to this proceeding, and further shows to the court—

89 That the object for which relator was incorporated, as set forth in said act of March 2, 1857, and referred to in said act of March 26, 1868, amendatory thereof, was to carry on the business of lighting the city of St. Louis, as well the public streets and alleys of said city as the private and public buildings thereof; that by said charter was granted to relator the right and privilege of lighting the said city and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that might at the date of said charter, to wit, on March 2, 1857, or at any time thereafter, be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established all pipes, fixtures, or other thing properly required to do the same; the same to be done with as much dispatch and as little inconvenience to the public as possible.

That for the purpose of lighting a city or to illuminate any space therein, whether a public street or alley or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent—that is to say, by bringing to a condition of white heat, in which it gives out light—any substance or material capable of being so used; that in order to light said city as aforesaid relator was expressly authorized by its charter to make and vend not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate lim-

90 its of said city all pipes, fixtures, or other thing properly required to do the same; that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions; that in order to use said gas for illuminating purposes it must be set on fire, which decomposes said gas, setting free the carbon therein in the form of fine particles and rendering said carbon particles incandescent, which produces what is called gas-light.

That light may also be produced from carbon by means of electricity, to wit, by using carbon not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or

through said carbon rods or filaments what is called electricity by means of apparatus suitable therefor, the result being that the carbon thus rendered incandescent gives out what is called electric light, which has greater illuminating power than gas-light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings, in many cities throughout the United States.

That the right and privilege of lighting the city of St. Louis aforesaid granted by its charter to relator includes the production of light in the manner last above described, to wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas and by making it incandescent in the manner above stated, to wit, by the application of heat, carbon being in either case the substance or
91 material which is made incandescent, thereby producing light, though when illuminating gas is used the carbon is in a compound form, the particles thereof being set free and made incandescent by heat, as above stated, producing what is called gas-light, while in the production of electric light pure carbon is used as a substitute for gas and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the city of St. Louis and of vending gas and gas-light, has heretofore established, placed, and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street and at divers and sundry other places beneath the surface of the streets of said city of St. Louis for supplying gas to its consumers and by means thereof relator has during more than (10) ten years last past carried on and still carries on its business as a lighting company, of all which said city and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true that, in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface. Relator states that its purpose in making the excavation on Broadway mentioned in said petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the
92 production of electric light as a substitute for gas-light; that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying, when completed, a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes, properly covered and protected, less than forty inches in width at the surface of the street, the said conduits and manholes, when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and

property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Relator denies that it has never acquired from the State of Missouri any right to place such wires above or beneath the streets of the city of St. Louis. Relator also denies that it is provided by section 2721 of article V, chapter 42, Revised Statutes of Missouri 1889, that no company shall place its wires or other fixtures under ground in any city unless it shall first obtain the consent of said city through the municipal authorities thereof. Even if the provisions of said article V of chapter 42 of the Revised Statutes of Missouri 1889 or of said section 2721, referred to by respondent, purported to relate or apply to this relator such provisions would be invalid as impairing the obligation of the contract contained in relator's
93 charter; but relator states that said article V of chapter 42 of the Revised Statutes of 1889 is a part of the general corporation law of this State, and that said section 2721 in terms applies exclusively to companies organized under the provisions of said article V for the purpose of constructing and maintaining telephone or magnetic telegraph lines and to no other corporations or class of corporations.

Relator admits that by article two, chapter fifteen, Revised Ordinances of the City of St. Louis 1887, as amended by ordinance No. 16894, the municipal authorities of said city of St. Louis undertook to prescribe certain conditions for placing wires, tubes, or cables conveying electricity along, across, or under the streets and alleys of said city, but states that the provisions of said ordinance are not fully set forth in respondent's return.

Relator states that the ordinance of the city of St. Louis last above mentioned and in said return referred to as article 2, chapter 15, Revised Ordinance of the City of St. Louis 1887, as the same has been amended by ordinance No. 16894, are the same ordinances which were revised and re-enacted by and are contained in article II of chapter 15 of the Revised Ordinance of said city of St. Louis 1892, to wit, ordinance No. 17188, entitled "An ordinance in revision of the ordinances of the city of St. Louis and to establish new ordinance provisions for the government of said city," approved April 7, 1893, said article two, chapter fifteen, being sections 603 to 614, both inclusive, of said revised ordinance No. 17188; that by said revised ordinance No. 17188 the municipal assembly of the city of St. Louis intended to and did revise and re-enact all
94 ordinances of said city then previously existing in pursuance of section 29 of article III of the charter of said city, and that from and after the 17th day of April, 1893, the said sections 603 to 614 of said revised ordinance No. 17188 were and are the only provisions of any existing ordinance of said city which purported to prescribe any regulations or conditions in respect of the placing by any person or corporation along, across, or under any of the streets, alleys, or public places in said city of any wires, tubes, or cables conveying electricity for the production of light, heat, or power, and

that the said sections 603 to 614, inclusive, of said revised ordinance No. 17188 are the ordinance provisions of said city of St. Louis which are averred in said respondent's return to be legal and binding and valid provisions and to be such as the city of St. Louis had the right to adopt and enact under the charter thereof.

Relator states and shows to the court that the said article II, chapter 15, Revised Ordinance of the City of St. Louis 1887, as the same was amended by ordinance No. 16894 and as now contained in article II, chapter 15 of the Revised Ordinance 1893, as sections 603 to 614, thereof, both inclusive, are in the words and figures following:

Article II.—Of electric wires, tubes, and cables.

SEC. 603. Conditions of placing wires, etc.—That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred twenty-three, now amended, or shall
95 be duly authorized by the municipal assembly, and then only as hereinafter provided. (Revised Ordinance 1887, sec. 581, amended.)

SEC. 604. Wires to be placed as prescribed by board.—All such wires, tubes or cables, along or across any of the streets, alleys or public places of the city of St. Louis shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements. (Revised Ordinance 1887, sec. 582.)

SEC. 605. Application and plat to be filed.—That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis and desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables. (Revised Ordinance 1887, sec. 583.)

SEC. 606. Permit may be granted.—The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, sec. 584, amended.)

96 SEC. 607. Wires, etc., may be placed on telegraph poles, etc., when.—That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along

or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall with the application and plat heretofore provided for, file in the office of the board of public improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the city of St. Louis, to the placing of such wires, tubes or cables upon the poles of said telegraph, telephone, electric light or power company, situated in the streets, alleys or public placed named in such application, the board of public improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light or power company, with such restrictions, regulations and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887, sec. 585, amended.)

Sec. 608. Poles to be placed in alleys, when.—That whenever an alley is available for the placing of poles, for the support of such wires, tubes or cables, the board of public improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the board of public improvements are of the opinion that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley
97 as practicable, and in such a manner as not to incommode the public or the adjoining proprietors or residents. (Revised Ordinance 1887, sec. 586, amended.)

Sec. 609. Dimensions, construction and location of poles.—The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the board of public improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes or cables; said wires, tubes or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases, when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees or other public or private property on the line of the street or alley or public place where such pole shall be erected. (Revised Ordinance 1887, sec. 587.)

Sec. 610. Streets and alleys to be replaced.—Any person or persons, corporation or association having made excavations in the streets, alleys or public places of the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance, or by the board of public

improvements, and to the satisfaction of the street commis-
98 sioners. (Revised Ordinance 1887, sec. 588.)

SEC. 611. Alterations in location of poles, etc., may be ordered.—The right is hereby reserved to the board of public improvements at any time to direct any alterations in the location of said poles, and also in the height at which the wires, tubes or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practicable thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided. (Revised Ordinance 1887, sec. 589.)

SEC. 612. Privileges conferred, on what conditions.—No person or persons corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article, shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for
the six months next preceding such statement, which shall be
99 sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing such statement with the comptroller, pay into the city treasurer two and one-half per cent. on the amount of such gross receipts up to the year eighteen hundred and ninety, and five per cent. on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes, or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost, or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article. (Revised Ordinance 1887, sec. 590.)

SEC. 613. Penalty.—Any person or persons, corporation or association which, or any president, manager, superintendent or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty dollars, nor more than five hundred dollars.
100 (Revised Ordinance 1887, sec. 591.)

SEC. 614. Reservation of rights.—The city reserves the right to alter, amend or repeal this article at any time. (Revised Ordinance, sec. 592.)

It is true that relator did not previous to the passage of said ordinance No. 16894 accept the provisions of said article II, chapter 15, Revised Ordinance 1887, and that it has never accepted the provisions of said ordinance No. 16894, and that it, said relator, has not been authorized by ordinance of the municipal assembly of the city of St. Louis to place its wires, tubes, or cables under the streets or alleys of said city.

Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights of this relator under its charter were or are concerned, and denies that as against this relator said city of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article III of the charter of said city, as by respondent alleged, or under any other provision of the charter of said city.

Relator further shows to the court that by reason of the exemptions contained as aforesaid in section 8 of said act of March 2, 1857, relator's charter as granted in and by said act of 1857 and as subsequently amended by the act of March 26, 1868, hereinbefore mentioned, was and is a contract by the State of Missouri with relator which was not nor is subject to alteration, suspension, or repeal by the State of Missouri or by any municipality thereof; that
101 said city of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator of any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinances of said city of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid and would impair the obligation of the said contract of the said State of Missouri contained in relator's charter as amended and would be in contravention of section 15 of article II of the constitution of Missouri, 1875, forbidding the General Assembly to pass any law impairing the obligation of contracts, and also of section 10 of article I of the Constitution of the United States, forbidding any State to pass any such law, each of which constitutional provisions is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in this behalf.

Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or

other thing properly required in order to carry on relator's said lighting business is that the same shall be done with as much dispatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its petition in this behalf alleged, and in applying to respondent as street commissioner of said city for a permit to make the necessary excavation therefor, relator has fulfilled every con-
102 dition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal, or binding enactments, nor constitute any defence to this proceeding—

Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not nor has the municipal assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the municipal assembly, thereby impairing the obligation of the contract contained in relator's charter as amended.

Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under color of its charter powers to compel relator to enter into the obligations and to pay to
103 said city from time to time the tax of five per cent. upon the gross annual receipts from relator's business prescribed by section 590, article II, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 590, article II, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article II, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association shall be entitled to any of the privileges conferred by said article II, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed, as hereinbefore set forth.

Because among the conditions prescribed by said section 590, re-enacted as section 612, relator would be compelled before availing itself of any of the rights or privileges mentioned in said article II, chapter 15, Revised Ordinance 1887, re-enacted as article II, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that

relator will comply with all the conditions of said article II or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the board of public improvements having reference to the subject-matter embraced in said article II or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

Because said article II, chapter 15, Revised Ordinance 1887, re-enacted as article II, chapter 15, Revised Ordinance 1892, pur-
104 ports to authorize the board of public improvements of said city, in granting a permit for the use or occupation of the streets, alleys, and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations, and qualifications as said board may think fit in respect of the use of said streets, alleys, and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article II, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted — clause 2, section 26, of article III of its charter, is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State or with said charter, and does not authorize the said mayor and municipal assembly or either of them by ordinance or otherwise to delegate to the board of public improvements of said city the power to make regulations for the use of said streets. Wherefore relator says that said requirements and said condition are unlawful and void.

And relator says that the several conditions and requirements prescribed in said article II, chapter 15, Revised Ordinance 1887, as amended and re-enacted in article II, chapter 15, Revised Ordinance 1892, are not independent of each other, but are so framed as to subject relator, its officers and agents, to the penalties prescribed in section 591 of Revised Ordinance 1887, re-enacted as section 613 of Revised Ordinance 1892, unless, before placing along, across, or under any street of the city of St. Louis any wires such as hereinbefore
105 mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the city of St. Louis, but shall also have filed in the office of the board of public improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance 1887, re-enacted as section 605, Revised Ordinance 1892, and shall have obtained a permit therefor from said board, with such restrictions, regulations, and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article II, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business and to pay to the city treasurer a tax of five per cent. upon the amount of such gross receipts, and shall also have filed with the city register its bond in the

sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

Wherefore relator says that it was not under any legal obligation to apply to the municipal assembly of said city for authority, nor to the board of public improvements of said city for a permit, to place its wires under ground in any street thereof, and that it was the duty of respondent as street commissioner of St. Louis, under the provisions of section 568, article II, chapter 15, of the Revised Ordinance 1887 of said city of St. Louis, to issue to relator a permit for an excavation such as applied for by relator.

106 Relator denies that either on the 26th of March, 1868, or on the 2nd of March, 1857, lighting by electricity was wholly unknown to art. On the contrary, relator avers that long before either of said dates electricity had been used for illuminating purposes, and apparatus had been devised and publicly exhibited to great numbers of persons by means of which solid bodies were made incandescent by electric currents so as to produce light which could be and was used for purposes of illumination, substantially as hereinbefore set forth.

THE LACLEDE GAS LIGHT COMPANY, *Relator.*
By HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER, *Its Attorneys.*

And afterwards, to wit, on the 29th day of June, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Respondent.

Comes now the said respondent, by attorney, and files his demurrer to relator's reply to this respondent's return herein.

Which said demurrer is in words and figures as follows, to wit:

In the Supreme Court of Missouri, April Term, 1895.

STATE *ex Rel.* LACLEDE GAS LIGHT COMPANY, Relator,
107 *vs.* No. 7434.
M. J. MURPHY, Street Commissioner, &c., Respondent.

Now comes said respondent and demurs generally to relator's reply to this respondent's return herein and assigns the following grounds therefor, to wit:

First. Because said reply does not state facts sufficient to constitute a defense to respondent's return.

Respondent further demurs specially to all that portion of re-

lator's return beginning at line 4 on page 1 with the words "that it, said relator, is advised," &c., and ending on line 12 of page 4 of said reply with the words "or any part thereof" and assigns the following grounds for this special demurrer, to wit:

1st. Because said matters are mere conclusions of law.

2nd. Because said matters do not show any right or power in relator to have or ask the rights prayed for in this proceeding.

3rd. Because said matters show on their face that relator's charter had expired prior to the institution of this proceeding, and therefore relator has no standing in court and no right to engage in business at all.

Respondent further demurs specially to all that part of relator's reply beginning at line 13 on page 4 thereof with the words "relator is advised and advers that even if the averment in respondent's return," &c., and ending on line 21 of page 6 thereof with the words "entirely avoided by placing said wires in said conduits" and assigns the following grounds for this special demurrer:

108 1st. Because it appears therefrom that relator has no power to manufacture or vend electricity.

2nd. Because it appears therefrom that electricity may be used for producing light and may be used in place of or as a substitute for gas-light, but it further appears that relator never had any power to manufacture or use the same.

3rd. Because it appears affirmatively from said reply that electricity is not a substance or material, and relator has no right to manufacture and vend the same.

Respondent further demurs specially to all that portion of relator's reply beginning at line 2 on page 7 with the words "relator admits that by art. 2, chap. 15, Rev. Ord. of the city of St. Louis 1887," &c., and ending at line 18 on page 13 with the words "as applied for by relator" and assigns the following grounds for this special demurrer, to wit:

1st. Because it affirmatively appears from such allegations of relator's reply that relator is subject to the police regulations contained in said ordinance provisions.

2nd. Because said ordinance provisions do not in any manner impair the obligation of any contract relator may have or at any time may have had, but they are valid regulations in any event.

Respondent further specially demurs to all that part of relator's reply beginning at line 19 on page 13 thereof with the words "relator denies that either on the 26th of March, 1868, or on the 2nd of March, 1857, lighting by electricity was wholly unknown to art" and ending on line 25 of page 13 thereof with the words "substantially as hereinbefore set forth" and assigns the following grounds for this special demurrer, to wit:

109 1st. Because, relator never having had the right to manufacture or vend electricity, it is not material to it or to this controversy whether or not electricity was know- to art on the 2nd of March, 1857, or on the 26th of March, 1868.

2nd. Because the act of 1868 did not confer any more power on relator in respect to lighting by electricity than was conferred by

the act of 1857, and relator is not entitled to the benefit of anything which became known to art in this respect between March 2nd, 1857, and March 26th, 1868.

Respondent respectfully prays the court to pass upon each and every one of the propositions herein raised. The questions have all been fully presented and must at no distant future date be decided, and it will be labor saved, both for the court and counsel, to have the whole matter passed upon in this proceeding.

Respondent is perfectly willing to have the court pass on all these questions on the arguments and briefs heretofore made and filed; but if the court is not sufficiently advised concerning all of said matters, then respondent respectfully prays that the court will set a time for hearing further argument in the premises.

Respondent earnestly prays the court to settle all these questions in this proceeding at this time because of the great pressing necessity to the city of St. Louis to have these matters settled, for their bearing on other pending questions in this city make it absolutely imperative that they should all be definitely decided, so that the city may know what its rights are in determining the questions now before it with reference to the use of its streets.

Respectfully submitted.

W. C. MARSHALL,
Att'y for Respondent.

110 And afterwards, to wit, on the 1st day of July, 1895, the further following proceedings were had in said cause, to wit:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY, Respondent.

Come now the said parties, by attorney-, and file their stipulation that the city of St. Louis may be made a party respondent herein. Which stipulation is in words and figures as follows, to wit:

In the Supreme Court of Missouri. Court in Banc.

STATE *ex. Rel.* LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, Respondent.
April Term, 1895. No. 7434.

It is hereby stipulated and agreed by and between the relator and the respondent in the above-entitled cause, by their respective attorneys, as follows:

1. That by consent of said parties respectively and by leave of said court the city of St. Louis may enter its appearance as a party to said cause, intervening therein for its own interest in respect of the several matters and things in the petition of relator and in the

alternative writ in this behalf set forth, and said city hereby
111 enters its appearance herein, and the said city of St. Louis, by like consent and leave of court, hereby adopts as its own the return heretofore filed by respondent to said alternative writ, and also adopts as its own the demurrer filed by said respondent.

HENRY HITCHCOCK,
G. A. FINKELNBURG,
I. H. LIONBERGER,
Attorneys for Relator.
W. C. MARSHALL,
Attorney for Respondent and for the City of St. Louis.

St. Louis, Missouri, June 28, 1895.

And afterwards, to wit, on the 2nd day of July, 1895, the further following proceedings were had in said cause, to wit:

THE STATE OF MISSOURI on the Relation of THE LACLEDE GAS LIGHT COMPANY, Relator,
vs.
MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, and The City of St. Louis, Respondents. } Mandamus.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court grants leave to the city of St. Louis to be made a party defendant herein and to adopt the return and demurrer heretofore filed by respondent Murphy, and thereupon, the said demurrer of respondents Murphy and The City of St. Louis to the reply of relator being submitted, and the court,
112 being now sufficiently advised of and concerning the premises, doth order and adjudge that the demurrer of respondents Murphy and The City of St. Louis to the reply of relator be sustained for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment. Thereupon in open court relator declines to plead further; and the court doth further order and adjudge that the peremptory writ of mandamus prayed for herein be, and the same is hereby, denied, and that the said respondents recover against the said relator their costs and charges herein expended and have therefor execution.

And afterwards, to wit, on the 2nd day of July, 1895, the further following proceedings were had in said cause, viz:

STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
MICHAEL J. MURPHY and THE CITY OF ST. LOUIS, Respondents.

Now, at this day, there is presented to Hon. Theo. Brace, chief justice of the supreme court of Missouri, at chambers, a writ of error to reverse the judgment in the above cause, and a citation directed to said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States on the first day of August,

1895, next; which said writ of error is allowed and said citation signed.

And afterwards, to wit, on the 6th day of July, 1895, the further following proceedings were had in said cause, viz:

113 STATE *ex Rel.* LACLEDE GAS LIGHT CO., Relator,
vs.
M. J. MURPHY *et al.*, Respondents.

Now, at this day, comes the said relator, by attorney, and files a supersedeas bond in the sum of fifteen hundred dollars; which said bond is approved and ordered made a part of the record herein.

Which said bond is in words and figures as follows, viz:

Know all men by these presents that we, The Laclede Gas Light Company, as principal, and —— ——, as sureties, are held and firmly bound unto Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis in the full and just sum of fifteen hundred dollars, to be paid to the said Michael J. Murphy, street commissioner as aforesaid, and The City of St. Louis; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at the April term, A. D. 1895, of the supreme court of the State of Missouri, in a suit depending in said court between The State of Missouri *ex rel.* The Laclede Gas Light Company, relator, plaintiff in error, and Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, defendants in error, judgment was rendered against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Michael
114 J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington, D. C., not exceeding thirty days from the date of the citation in said cause:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE LACLEDE GAS LIGHT CO., [SEAL.]
By A. ROSS, *Secretary & Gen'l Mg'r.*
GEORGE A. MADILL. [SEAL.]
J. C. VAN BLARCOM. [SEAL.]

[L. S.] Attest: A. ROSS, *Sec'y.*

Sealed and delivered in presence of—

—— ——.

Approved by—
THEO. BRACE, *Judge.*

STATE OF MISSOURI, *set:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The State *ex rel.* The Laclede Gas Light Company, relator, *vs.* Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis, respondents, as fully and complete as the same appears of record and on file in my said office.

Seal of the Supreme Court of Missouri.

Witness my hand as clerk and the seal of said court, hereto affixed. Done at office, in Jefferson City, Mo., this 13th day of July, A. D. 1895.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: Case No. 15,957. Missouri supreme court. Term No., 667. The State of Missouri *ex relatione* The Laclede Gas Light Company, plaintiff in error, *vs.* Michael J. Murphy, street commissioner of the city of St. Louis, and The City of St. Louis. Filed July 24th, 1895.